

CALIFORNIA COASTAL COMMISSION

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STAFF REPORT AND RECOMMENDATION

ON CONSISTENCY DETERMINATION

Consistency Determination No.	CD-003-02
Staff:	LJS-SF
File Date:	1/15/2002
60th Day:	3/16/2002
75th Day:	3/31/2002
Commission Meeting:	3/5/2002

FEDERAL AGENCY: Corps of Engineers

PROJECT
LOCATION:

Statewide

PROJECT
DESCRIPTION:

Issuance, reissuance, and modifications of 44 Nationwide Permits for discharge of dredge and fill material into waters of the United States.

SUBSTANTIVE FILE DOCUMENTS:

1. Notice of Issuance of Nationwide Permits, Federal Register, Vol. 67, No. 10, pp. 2020-2095, January 15, 2002.
2. Proposal to Issue, Reissue, and Modify Nationwide Permits, Federal Register Vol. 66, No. 154, pp. 42070-42100, August 9, 2001.

3. Consistency Certification No. CC-147-96 (Corps of Engineers, Issuance, Reissuance, and Modifications of 39 Nationwide Permits).
4. Consistency Certification No. CC-39-91 (Corps of Engineers, Authorization of 36 Nationwide Permits).
5. Consistency Certification No. CC-15-84 (Corps of Engineers, Amendment to previously approved Nationwide Permit program).
6. Consistency Certification No. CC-13-83 (Corps of Engineers, Authorization of Nationwide Permits).
7. Consistency Certification No. CC-40-95 (Corps of Engineers, Issuance of a Nationwide Permit for residential structures).

EXECUTIVE SUMMARY

The Corps of Engineers (Corps) proposes to issue, reissue, and modify 44 Nationwide Permits (NWP) authorizing discharges and construction in waters of the United States. All the issued, reissued, and modified NWP contained in the Corps' January 15, 2002, notice will become effective on March 18, 2002, and will expire on March 18, 2007. A NWP is a general approval of the activity identified in that permit. Although the "permittee" does not need any other permits from the Corps, in some cases, it must notify the Corps before it discharges fill into waters of the United States. The Commission's concurrence with this consistency determination would result in a general federal consistency concurrence for all authorized activities that would otherwise be subject to the Commission's federal consistency jurisdiction. Because they circumvent the Commission's jurisdiction, and due to their potential resource impacts and lack of consistency with Section 30233(a) of the Coastal Act, the Commission most recently found in 1997 that the existing NWP were inconsistent with the California Coastal Management Program (CCMP) and objected to CC-147-96 (Corps of Engineers). The effect of that objection required "permittees" for NWP to either receive a concurrence or waiver of a consistency certification from the Commission before their NWP became valid.

The proposed NWP in the subject consistency determination are inconsistent with Section 30233 of the Coastal Act. In most cases, the construction activities

authorized by these NWP are not allowable uses pursuant to Section 30233. Additionally, the approval in advance of any development proposal does not allow the Commission to determine if the development is the least damaging feasible alternative. Finally, most of the proposed NWPs do not include a requirement for mitigation of any adverse wetland impacts. For those that require mitigation, the Commission will not have the ability to determine the adequacy of the mitigation.

An objection to the Corps' proposed NWP program will not eliminate Nationwide Permits in the California coastal zone. Instead, it will maintain an existing procedure used by the Commission which requires federal consistency review of the activity before a NWP can apply to a specific activity. Depending on the circumstances, the Commission can either waive consistency certification or require a consistency certification. Pursuant to the CCMP, a coastal development permit issued by the Commission functions as a consistency certification. In addition, Coastal Act Section 30719 states that activities consistent with a port master plan are consistent with the CCMP for Coastal Zone Management Act purposes. If an activity is within a certified LCP's appeal zone, on a case-by-case review the staff will waive the requirement for a consistency certification if the activity does not raise any statewide or regional issues. Finally, if an activity is within a certified LCP jurisdiction or outside the coastal zone, the staff has the discretion to waive a consistency certification if the activity does not have significant adverse effects on coastal resources.

STAFF SUMMARY AND RECOMMENDATION:

I. Project Description.

The Corps of Engineers proposes to issue, reissue and modify 44 NWPs (and associated General Conditions and Definitions). NWPs are general pre-approvals of discharge of fill or dredge material into waters of the United States for specified activities. The Corps created the NWP program to minimize regulatory requirements for discharging fill associated with projects that have minor effects. Unless otherwise specified, the Corps authorizes a permittee to discharge without notice to the Corps.

The following list identifies all the proposed NWPs:

1. Aids to Navigation
2. Structures in Artificial Canals

3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Maintenance
8. Oil and Gas Structures
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
12. Utility Line Activities
13. Bank Stabilization
14. Linear Transportation Projects
15. U.S. Coast Guard Approved Bridges
16. Return Water from Upland Contained Disposal Areas
17. Hydropower Projects
18. Minor Discharges
19. Minor Dredging
20. Oil Spill Cleanup
21. Surface Coal Mining Activities
22. Removal of Vessels
23. Approved Categorical Exclusions
24. State Administered Section 404 Programs
25. Structural Discharges
26. [Reserved]
27. Stream and Wetland Restoration Activities
28. Modifications of Existing Marinas
29. Single-Family Housing
30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities
32. Completed Enforcement Actions
33. Temporary Construction, Access and Dewatering
34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Ramps
37. Emergency Watershed Protection and Rehabilitation
38. Cleanup of Hazardous and Toxic Waste
39. Residential, Commercial, and Institutional Developments
40. Agricultural Activities

- 41. Reshaping Existing Drainage Ditches
- 42. Recreational Facilities
- 43. Stormwater Management Facilities
- 44. Mining Activities

The following list identifies all the proposed General Conditions associated with the NWP program:

- 1. Navigation
- 2. Proper Maintenance
- 3. Soil Erosion and Sediment Controls
- 4. Aquatic Life Movements
- 5. Equipment
- 6. Regional and Case-by-Case Conditions
- 7. Wild and Scenic Rivers
- 8. Tribal Rights
- 9. Water Quality
- 10. Coastal Zone Management
- 11. Endangered Species
- 12. Historic Properties
- 13. Notification
- 14. Compliance Certification
- 15. Use of Multiple Nationwide Permits
- 16. Water Supply Intakes
- 17. Shellfish Beds
- 18. Suitable Material
- 19. Mitigation
- 20. Spawning Areas
- 21. Management of Water Flows
- 22. Adverse Effects from Impoundments
- 23. Waterfowl Breeding Areas
- 24. Removal of Temporary Fills
- 25. Designated Critical Resource Waters
- 26. Fills Within the 100-year Floodplain
- 27. Construction Period

The following list identifies all the proposed Definitions associated with the NWP program:

Best Management Practices
Compensatory Mitigation
Creation
Enhancement
Ephemeral Stream
Farm Tract
Flood Fringe
Facilities
Floodway
Independent Utility
Intermittent Stream
Loss of Waters of the U.S.
Non-Tidal Wetland
Open Water

Perennial Stream
Permanent Above-grade Fill
Preservation
Restoration
Riffle and Pool Complex
Single and Complete Project
Stormwater Management
Stormwater Management
Stream Bed
Stream Channelization
Tidal Wetland
Vegetated Buffer
Vegetated Shallows
Waterbody

Exhibit 1 (comprised of pages 2020 through 2095 of the January 15, 2002, Federal Register) contains a complete description of the aforementioned NWP's (see pages 2078-2089), General Conditions (see pages 2089-2094), and Definitions (see pages 2094-2095) included in the Corps' consistency determination, which the Commission incorporates into these findings by reference.

Most of the NWP's and General Conditions are similar to the previously issued permits. However, the Corps of Engineers proposes to modify the following nine NWP's:

- 14. Linear Transportation Projects
- 21. Surface Coal Mining Activities
- 27. Wetland and Riparian Restoration and Creation Activities
- 31. Maintenance of Existing Flood Control Facilities
- 37. Emergency Watershed Protection and Rehabilitation
- 39. Residential, Commercial, and Institutional Developments
- 40. Agricultural Activities
- 42. Recreational Facilities
- 43. Stormwater Management Facilities

The Corps of Engineers also proposes to modify the following six General Conditions and add one new General Condition (#27):

- 4. Aquatic Life Movements
- 9. Water Quality
- 13. Notification
- 19. Mitigation
- 21. Management of Water Flows
- 26. Fills Within the 100-year Floodplain
- 27. Construction Period

Exhibit 1 also contains a discussion of the public comments received and the Corps' final decision on all the NWPs and General Conditions, including the above-referenced modifications, and is incorporated into these findings by reference. For ease of location, the discussion of the modified NWPs is found on pages 2029 through 2058 of the Federal Register excerpt provided; for the modified General Conditions, see pages 2060 through 2074.

Exhibit 2 is a four-page-long Corps of Engineers document published in the February 13, 2002, Federal Register which contains *corrections* to the final notice of issuance of Nationwide Permits which was published on January 15, 2002 and included in **Exhibit 1**.

II. Federal Agency's Consistency Determination.

The Corps of Engineers has determined the project to be consistent to the maximum extent practicable with the California Coastal Management Program.

III. Staff Recommendation.

The staff recommends that the Commission adopt the following motion:

Motion:

I move that the Commission concur with consistency determination CD-003-02 that the project described therein is fully consistent, and thus is consistent to the maximum extent practicable, with the enforceable policies of the California Coastal Management Program (CCMP).

Staff Recommendation:

Staff recommends a **NO** vote on the motion. Failure of this motion will result in an objection to the determination and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.

Resolution To Object to Consistency Determination:

The Commission hereby **objects** to the consistency determination by Corps of Engineers on the grounds that the project described therein is not consistent to the maximum extent practicable with the enforceable policies of the CCMP.

IV. Applicable Legal Authorities. Section 307 of the Coastal Zone Management Act (CZMA) provides in part:

(c)(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.

V. Procedure if the Commission finds that the proposed activity is inconsistent with the CCMP.

Section 930.43(a) of the federal consistency regulations (15 CFR Section 930.43(a)) requires that, if the Commission's objection is based on a finding that the proposed activity is inconsistent with the CCMP, the Commission must identify measures, if they exist, that would bring the project into conformance with the CCMP. That section states:

(a) In the event the State agency objects to the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency response shall describe: (1) How the proposed activity will be inconsistent with specific enforceable policies of the management program; and (2) The specific enforceable policies (including citations).

(3) The State agency should also describe alternative measures (if they exist) which, if adopted by the Federal agency, would allow

the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency's objection.

As described in the Wetland Fill section below, the proposed activity is inconsistent with the CCMP. Pursuant to the requirements of Section 930.43(a) of the federal regulations implementing the CZMA, the Commission is responsible for identifying measures, if they exist, that would allow the activity to be found consistent to the maximum extent practicable with the CCMP. Since most of the NWP's do not meet the allowable use test described in Section 30233 of the Coastal Act and none of the NWP's can be evaluated for consistency with the alternative and mitigation tests at a general level, *there are no alternative measures that could bring this permit into compliance with the CCMP.* However, as a practical matter, the Commission's approach to reviewing projects on a case-by-case approach represents an alternative that allows individual projects to proceed (see pages 13 and 14 for elaboration).

VI. Practicability. The federal consistency regulations implementing the CZMA include the following provision:

Section 930.32 Consistent to the maximum extent practicable.

(a)(1) The term "consistent to the maximum extent practicable" means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.

Since the Corps has raised no issue of practicability, as so defined, the standard before the Commission is full consistency with the policies of the California Coastal Management Program (CCMP).

VII. Findings and Declarations:

The Commission finds and declares as follows:

A. Wetland Fill. Section 30233(a) of the Coastal Act provides, in part, that:

The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

- (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
- (2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
- (3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland, provided, however, that in no event shall the size of the wetland area used for such boating facility, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, be greater than 25 percent of the total wetland area to be restored.*
- (4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- (5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- (6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- (7) Restoration purposes.*

(8) *Nature study, aquaculture, or similar resource-dependent activities.*

The Commission previously evaluated the Corps' NWP program on three occasions. In its first review, in 1983 and 1984 (CC-15-84 and CC-13-83), the Commission concurred with most of the NWPs.

In its second review, in 1991, the Commission objected to the entire program (CC-39-91). That objection was necessary because the Corps' consistency certification lacked the necessary information for the Commission to concur with the consistency certification and because several of the NWPs were inconsistent with the CCMP, specifically Section 30233. The Corps did not provide a final and complete description of the program, definitions for vague terms such as "minimal," "small," or "temporary," or analysis of cumulative impacts to the coastal zone. Without this information, the Commission could not assess the project's impact to coastal resources and uses, and, therefore objected to the Corps' consistency certification. In addition, the NWP program raised issues regarding fisheries, water quality, and oil and gas development. The activities authorized by these NWPs could result in significant individual and cumulative impacts to coastal resources. The NWP program did not contain any assurances that the "permittees" would conduct authorized activities in a manner consistent with the CCMP. Therefore, the Commission found that NWP program to be inconsistent with the CCMP.

In its third review, in 1996, the Commission again objected to the entire program (CC-147-96). The Commission found that the proposed NWPs were inconsistent with Section 30233 of the Coastal Act, in particular, the allowable use, least damaging feasible alternative, and mitigation policies of Section 30233(a).

The NWP program expires every five years. The current proposal is the reissuance of the previous NWPs and modifications to nine of the NWPs. *The Corps' consistency determination is a two page letter that is similar to the 1996 NWP submittal.* The consistency determination does not adequately address the issues previously raised by the Commission, most recently in CC-147-96. Therefore, the issues raised by the Commission in its previous analysis are still valid. The Commission incorporates the findings supporting its objection to the 1996 NWPs (CC-147-96) by reference (**Exhibit 3**).

The proposed NWP program allows the placement of fill into waters of the United States for any purpose described in an issued NWP. Since this program authorizes the placement of fill within wetlands, the Commission must determine if the permit is consistent with Section 30233(a) of the Coastal Act. That section restricts the placement of fill into wetlands to eight enumerated uses. The following NWPs are for activities that do not appear to be consistent with Section 30233: NWP 2 (Structures in Artificial Canals), NWP 3 (Maintenance), NWP 6 (Survey Activities), NWP 14 (Linear Transportation Projects), NWP 15 (U.S. Coast Guard Approved Bridges), NWP 19 (Minor Dredging), NWP 25 (Structural Discharges), NWP 29 (Single-Family Housing), NWP 31 (Maintenance of Existing Flood Control Projects), NWP 33 (Temporary Construction, Access and Dewatering), NWP 39 (Residential, Commercial, and Institutional Developments), NWP 40 (Agricultural Activities), NWP 41 (Reshaping Existing Drainage Ditches), NWP 42 (Recreational Facilities), NWP 43 (Stormwater Management Facilities), and NWP 44 (Mining Activities).

In most cases, the Commission would find such activities inconsistent with the Coastal Act. However, through an individual review, the Commission may find that under special circumstances some of the activities authorized by these NWPs are consistent with the allowable-use requirement of the Coastal Act. Nevertheless, the Commission can only make that determination on an individual basis. Thus, a general approval for fill associated with these activities in advance of a project proposal is inconsistent with the allowable-use requirement of Section 30233(a) of the Coastal Act. Therefore, the Commission finds that these NWPs are inconsistent with the allowable-use requirement of Section 30233.

Another requirement of Section 30233(a) allows the Commission to approve an activity if it is the least damaging feasible alternative and to determine if it includes feasible mitigation to reduce any environmental impacts. The proposed NWP program does not provide for analysis of alternatives or mitigation. The NWPs authorizes the “permittee” to place fill in the aquatic environment even if there is a less damaging alternative. Additionally, most of the NWPs do not require mitigation, and may result in a net loss of wetlands. With respect to the NWPs that allow for mitigation, there is no process for public, governmental, and scientific review of that mitigation to ensure that the project minimizes environmental effects. Additionally, the program would not allow for the Commission to determine if the mitigation is adequate to address the project’s impacts or its consistency with the Coastal Act. Therefore, the Commission finds that the

proposed NWP program is inconsistent with the alternatives and mitigation requirements of Section 30233(a).

In conclusion, the proposed NWP program is inconsistent with Section 30233(a) of the Coastal Act for the following reasons: (1) it would authorize activities that are not normally allowable under Section 30233(a); (2) it does not require the permittee to construct the least damaging feasible alternative; and (3) it does not require mitigation for adverse impacts to wetland habitat. Additionally, the NWP program does not provide enough information to fully evaluate the project's consistency with the CCMP. Therefore, the Commission finds that the proposed development is inconsistent with the wetland fill policy of the CCMP.

B. Procedures. As stated above, the Commission objected to the 1996 NWP program. This objection initiated a process provided for in the NWP regulations (33 CFR 330.4(d)). Specifically, these regulations require “applicants” to coordinate with the state coastal management agency pursuant to the requirements of the Coastal Zone Management Act before the activity can make use of an NWP. However, for those activities inside or affecting the coastal zone, the NWPs are not valid until the Commission either concurs with a consistency certification or waives federal consistency. After the “permittee” completes the federal consistency process, the NWPs are valid for that activity. Since its last objection to the NWP program, the Commission has waived federal consistency on most of the activities subject to NWPs.

The staffs of the Corps and the Commission have informally agreed upon procedures that allow most activities qualifying for a NWP to continue without any significant delays. Upon receipt of notice of a pre-discharge notice or other notice of a NWP activity within a coastal area, the Corps sends the applicant a letter informing the applicant that the NWP is not valid until the applicant receives either a federal consistency concurrence or waiver from the Commission (**Exhibit 4**). Upon receipt of a copy this letter (usually within two weeks), the Commission staff sends a “Jurisdiction Letter” (**Exhibit 5**) to both the Corps and the applicant identifying the Commission federal consistency or permit jurisdiction or, if appropriate, waiving federal consistency. If the activity does not require coastal development permit or federal consistency review, the Commission's jurisdiction letter ends the Commission's involvement for that activity. If additional Commission review is necessary, it will complete the process within the appropriate statutory or regulatory requirements. A Commission objection to this consistency determination will have the same effect as the previous objection. The

NWP will not be valid for any qualifying activity until the Commission either concurs with a consistency certification or waives the requirement.